



**Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** J&J Maintenance, Inc.

**File:** B-240799; B-240802

**Date:** December 19, 1990

Donald E. Barnhill, Esq., East & Barnhill, for the protester. Thomas G. Jeter, Esq., Sherman & Howard for the interested party, Hospital Shared Services of Colorado. Major Jack B. Patrick, Esq., and Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency. Anne B. Perry, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### **DIGEST**

1. Protest that agency improperly conducted written decisions with protester since oral discussions were conducted with low bidder under a two-step sealed bid acquisition is denied since the protester was provided with an opportunity sufficient to make its step-one proposal acceptable, which satisfies the agency's obligations under the applicable regulation.
2. Protest that agency engaged in technical leveling and transfusion in its discussions with the low bidder is denied where agency did not discuss protester's proposal with awardee nor did the agency repeatedly ask the same or similar questions or suggest technical approaches necessary to render the step-one technical proposal acceptable.
3. Protest that low offeror's bid in two-step procurement is below-cost or that bidder cannot adequately perform at the cost of its bid is denied since it is not illegal to submit a below-cost bid, and whether a bidder can perform at its bid price concerns a matter of responsibility which is not for review by the General Accounting Office.

### **DECISION**

J&J Maintenance, Inc. protests the award of a contract to Hospital Shared Services of Colorado (HSSC), under invitation for bids (IFB) No. DAKF23-90-B-0045, step two of a two-step sealed bid acquisition, issued by the Department of the Army, for maintenance services of the United States Army Medical and

050261/142868

Dental Activities at Fort Campbell, Kentucky.<sup>1/</sup> J&J Maintenance, the incumbent contractor for these services, alleges that the Army engaged in improper discussions with HSSC under request for technical proposals (RFTP) No. DAKF23-90-R-0301, step one of the procurement. The protester also alleges that HSSC's bid under step two is nonresponsive because it fails to provide the minimum staffing required under the specifications.

We dismiss the protest in part and deny it in part.

The RFTP was issued February 7, 1990, for proposals for the operation, maintenance, repair, inspection, and housekeeping services for the Blanchfield Army Community Hospital. The solicitation contemplates the award of a 1-year firm, fixed-price contract with three 1-year option periods. Under step one, offerors were required to submit a technical proposal describing technical approach, management, and experience, without reference to price.

The Army received four technical proposals by the amended closing date of April 20. Both the protester and HSSC's technical proposals were determined to be reasonably susceptible of being made technically acceptable and, as a result, the agency conducted written discussions with each on June 12, with any revisions/clarifications to their proposals due by June 25. On July 11, the contracting officer conducted further written discussions with J&J Maintenance, and requested oral discussions with HSSC, which occurred on July 16. Both offerors were required to submit revisions/clarifications to their proposals by July 23.<sup>2/</sup> On June 25, the contracting officer, in writing, requested two further clarifications to HSSC's proposals, with responses due and received on July 26. The contracting officer made a final determination that the proposals submitted by HSSC and J&J Maintenance were fully acceptable and, on July 27, issued step two of the acquisition, the IFB, with an August 10 bid

---

<sup>1/</sup> Two-step sealed bidding is a hybrid method of procurement that combines elements of sealed bidding and negotiations. Step one is similar to a negotiated procurement in that the agency requests technical proposals, without prices, and may conduct discussions. Step two consists of a price competition among those firms which submitted acceptable proposals under step one, with each offer submitting a bid based upon its own proposal. Federal Acquisition Regulation (FAR) Subpart 14.5; Simulaser Corp., B-233850, Mar. 3, 1989, 89-1 CPD ¶ 236.

<sup>2/</sup> HSSC submitted its responses on July 20, and J&J Maintenance submitted its responses on July 23.

opening date. On August 8, J&J Maintenance requested an opportunity to change the staffing in its proposal. The agency refused this request on the basis that the step-two IFB already had been issued. At bid opening, HSSC was the apparent low bidder with a total bid, inclusive of option periods, of \$12,417,325. J&J Maintenance's total bid was \$13,105,266.00. On August 15, J&J Maintenance filed this protest in our Office challenging the award to HSSC. J&J Maintenance generally alleges that the agency conducted improper discussions with HSSC under step one, and that HSSC's bid under step two was nonresponsive for failing to bid the minimum staffing requirements.

#### IMPROPER DISCUSSIONS

J&J Maintenance contends that the agency conducted discussions improperly because the agency: (1) failed to engage in discussions with all offerors; (2) engaged in technical leveling and technical transfusion with HSSC; (3) conducted an improper site visit with HSSC after step two was issued; and (4) failed to provide offerors with a common cutoff date for receipt of revisions to technical proposals.

With respect to the first allegation, the protester argues that the Army failed to engage in oral discussions with J&J Maintenance, but did engage in extensive oral discussions with HSSC, thus treating the offerors unequally.

Under step one of a two-step sealed bid acquisition, technical proposals are submitted and evaluated, with no pricing, to allow the agency to determine the acceptability of the supplies or services offered. FAR § 14.501(a). The regulation provides that, if warranted to increase competition, the contracting officer shall request offerors whose proposals may be made acceptable to submit additional clarifying or supplementing information, and that the contracting officer shall identify the deficiencies or additional information required. FAR § 14.503-1(f)(1). The same regulation permits, but does not require, the contracting officer to arrange discussions for this purpose. *Id.* Thus, under step one of a two-step acquisition, an offeror is entitled only to an opportunity to provide information necessary to make its proposal acceptable, and there is no requirement that any discussions be conducted with a technically acceptable offeror. In any case, here the agency did conduct two successive rounds of written discussions with the protester, and both times provided J&J Maintenance with the opportunity to revise its proposal. Since J&J Maintenance was able to make its offer technically acceptable as a result of the agency's written inquiries, J&J Maintenance has no basis to object to the manner in which the agency conducted discussions.

J&J Maintenance next alleges that the agency engaged in technical leveling and transfusion with respect to HSSC's technical proposal, counseling HSSC on which automated system to use and revealing J&J Maintenance's technical plan to HSSC. FAR § 14.503-2(f)(1) provides that no proposal shall be discussed with any offeror other than the submitter. Our review of the record reveals that no such improper discussions were conducted.

J&J Maintenance surmises that the extra and later-in-time discussions with HSSC resulted in improper disclosures. However, the written discussions and the memorandum of oral discussions evidence that no improper actions occurred. J&J Maintenance's proposal was not discussed with HSSC, and the government never "suggested" any particular approach to HSSC including the approach proposed by J&J Maintenance.

J&J Maintenance next argues that the contracting activity improperly permitted subcontractors of HSSC to conduct a site visit after step two was issued, and did not invite J&J Maintenance to participate. The protester believes that HSSC was put on notice of technical deficiencies in its proposal at this time.

The Army denies that any discussions occurred at the time of this site visit with HSSC's subcontractors, and states that no contracting personnel were present at the site visit. The agency states that the site visit was made by subcontractors of HSSC so that they could accurately submit their bids to HSSC, for HSSC to incorporate in its own bid. We do not see anything improper in the agency's actions in this regard, particularly since the step-two IFB urged bidders to conduct a site visit. Although J&J Maintenance alleges that the agency acted unfairly or in bad faith by not "inviting" the protester to this site visit, J&J Maintenance, as the incumbent contractor, has not shown how it was prejudiced by not being present, since no changes to the technical proposals were permissible at this point, and it was not denied the opportunity to have its subcontractors conduct a site visit. There is no basis to find that the site visit was improper, or that it is otherwise indicative of bias or preferential treatment of HSSC. See G.E. American Communications, Inc., B-240385, Nov. 16, 1990, 90-2 CPD ¶ \_\_\_\_.

J&J Maintenance's final allegation concerning improper discussions is that the agency failed to provide bidders with a common cutoff date for receipt of revisions to their technical proposals. However, under FAR § 14.503-1(f)(2), while the contracting officer is required to give bidders an appropriate time to conclude discussions and submit additional

information, there is no requirement for a common cutoff date if more than one bidder is permitted to revise its offer.

#### RESPONSIVENESS OF HSSC's BID

J&J Maintenance contends that HSSC's bid under step two should be rejected as nonresponsive because it failed to provide the minimum staffing requirements of the solicitation. The protester argues that according to its own calculations, using the applicable wage determinations and the number of hours required, HSSC could not provide the requisite staffing. J&J Maintenance argues that HSSC's low bid demonstrates that HSSC does not intend to comply with the requirements of the solicitation and therefore, should be rejected as nonresponsive. We disagree.

Responsiveness involves a determination of whether a bidder has unequivocally offered to provide supplies or services in conformity with all of the material terms and conditions of the IFB. Gardner Zemke Co., B-238334, Apr. 5, 1990, 90-1 CPD ¶ 372. Only where a bidder provides information with its bid that reduces, limits, or modifies a material requirement of the solicitation may the bid be rejected as nonresponsive. Id. Here, HSSC submitted a bid based on its technical proposal which the agency determined to be technically acceptable; in other words, HSSC submitted a bid which incorporated a technical proposal that complied with all of the material terms and conditions of the solicitation. Since HSSC's bid took no exceptions to the solicitation requirements, HSSC's bid is responsive.

To the extent that the protester is alleging that HSSC submitted a bid price that will not cover its cost, this provides no basis for protest. A prospective contractor's ability to perform the contract at the price it offered is a matter of responsibility for the agency to determine before contract award. AZTEK, B-229750.3, Apr. 13, 1988, 88-1 CPD ¶ 361. Our Office will not review an affirmative determination of responsibility absent a showing of possible fraud or bad faith by the procuring officials or that definitive responsibility criteria have not been met. Id. Neither exception is applicable in this case.<sup>3/</sup> Further, whether HSSC

---

<sup>3/</sup> J&J Maintenance alleged, for the first time in its comments on the informal conference and agency report, that HSSC does not meet several alleged definitive responsibility criteria under the solicitation. We dismiss these allegations since they were untimely raised in a piecemeal fashion. See Western Office Sys., Inc., B-225998, Feb. 26, 1987, 87-1 CPD ¶ 227.

will comply with its contractual obligations is a matter of contract administration that is not reviewed under our bid protest function. 4 C.F.R. § 21.3(m)(1) (1990).

The protest is dismissed in part and denied in part.



James F. Hinchman  
General Counsel